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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JERRY PAGAN,

Defendant and Appellant.

A132992

(San Mateo County  
Super. Ct. No. SCO73498A)

Jerry Pagan appeals from a judgment upon a jury verdict convicting him of one count of possession of a controlled substance (methamphetamine) and the court's determination that his sentence be enhanced due to his commission of a prior serious felony. His court-appointed counsel has filed a brief seeking our independent review of the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436 to determine whether there are any arguable issues on appeal. Pagan has also filed a brief asserting several grounds of possible error. After considering Pagan's brief and following our independent review of the entire record, we affirm.

**Factual Background**

Police officer Dan Smith was in uniform and driving his patrol car one evening in downtown Redwood City when he spotted some people who appeared to be loitering in the CalTrain depot. He parked his car, and as he walked up to the building several of the people walked off, but two men remained in the area. Smith knew one of the men from

prior contacts, and asked the men to produce identification. Pagan was the other person who remained, and was sitting on a nearby bench.

While Smith was speaking with the first man, he noticed an eyeglass case protruding from Pagan's pants pocket. Smith briefly looked away, and when he looked back, the case was on the ground near Pagan's foot. Smith told Pagan that he had dropped the case for his eyeglasses, and Pagan denied that the case belonged to him.

After officer Smith was done speaking with the first man, he turned his attention to Pagan. Smith asked Pagan if he was currently on parole, and Pagan replied that he was. Smith eventually picked up the eyeglass case and examined its contents. He discovered what appeared to be three bindles of narcotics.

The bindles were later confirmed to contain a usable amount of methamphetamine. The parties stipulated that there were no latent fingerprints recovered from the eyeglass case, the plastic bindles, or the eyeglasses, a dollar bill and cigarette butt that were also found in the case. It was also stipulated that the methamphetamine tested was retrieved from the eyeglass case.

### **Procedural Background**

Pagan was charged in an information with one count of possession of a controlled substance in violation of Health and Safety Code section 11377, subdivision (a). It was also alleged that Pagan was ineligible for probation on account of two prior felony convictions: one for second degree robbery in violation of Penal Code section 212.5, subdivision (c),<sup>1</sup> and the other for attempting to bring contraband into a jail or prison facility in violation of section 4573.8. The information also alleged that Pagan's sentence be doubled pursuant to section 667.5, subdivision (b) due to his service of a term in prison within five years of his arrest. A second count alleged an infraction for possession of marijuana.

Following the preliminary hearing, the People successfully moved to amend the information to allege the prior robbery as a serious felony that would enhance Pagan's

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<sup>1</sup> Unless otherwise indicated, further statutory references are to the Penal Code.

sentence pursuant to section 1170.12, subdivision (c)(1). At the hearing on the motion to amend, Pagan informed the court that he wished to make a *Marsden*<sup>2</sup> motion to discharge his court-appointed attorney.

At the hearing on Pagan's *Marsden* motion, the court considered Pagan's complaints, and his counsel's response describing his activities on Pagan's behalf and criminal defense experience. The court found counsel had "done everything that need be done and should be done, exploring all the various options, both with [Pagan] and what might occur in the future should [Pagan] be convicted." The motion was denied. The case proceeded initially to a mistrial that was called on a defense motion due to the People's tardy production of a police report related to an earlier incident when it was thought Pagan had hidden controlled substances in an eyeglass case.

When trial commenced the second time, Pagan agreed to sever the trial of his prior offenses, and allow them to be determined by the court instead of the jury. Evidence was properly limited by rulings on motions in limine, and a *Wheeler/Batson*<sup>3</sup> motion brought for dismissal of a single juror who appeared to be a Pacific Islander was denied after the court determined the defense had not made a prima facie showing. The prosecution was allowed to impeach Pagan with his prior robbery conviction should he testify.

The prosecution case consisted of testimony by officer Smith and a criminalist employed by the San Mateo County Sheriff's Forensic Laboratory. At the conclusion of the prosecution case, the defense moved exhibits into evidence and rested. The thrust of the defense argument was to attack Officer Smith's credibility due to discrepancies between his report and his testimony, and to explain the eyeglass case could not have fallen from Pagan's pocket as Smith claimed.

The court granted a jury request that all of Smith's testimony be read back. The jury deliberated for one afternoon without reaching a verdict. The next morning a sitting juror was excused due to illness, and an alternate put in her place. That afternoon, the jury asked what "unlawfully possessed" meant in the context of the instructions on the

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<sup>2</sup> *People v. Marsden* (1970) 2 Cal.3d 118.

<sup>3</sup> *People v. Wheeler* (1978) 22 Cal.3d 258; *Batson v. Kentucky* (1986) 476 U.S. 79.

possession charge. The court responded to the question by providing an instruction proffered by the defense. It read: “Mr. Pagan is charged in the information with actually possessing methamphetamine. ‘Actual possession’ requires that a person knowingly exercise direct physical control over a thing.”

Thereafter, the jury returned its guilty verdict. The jury was polled and each juror affirmed the verdict. The court then conducted a trial on Pagan’s prior offenses and determined that both of them were proved.

Pagan filed another *Marsden* motion while he was awaiting sentencing. Following a hearing, the trial court determined there was no substandard performance by defense counsel and the motion was denied. Pagan’s counsel moved to strike the prior robbery charge alleged as a serious felony under the Three Strikes law, and to have his conviction reduced to a misdemeanor. The court denied both motions and, based in part upon Pagan’s previous failures on parole, found he was well within the spirit of the Three Strikes law.

Pagan was sentenced to the low term of 16 months in prison doubled to 32 months due to his prior serious felony conviction. The additional time due to Pagan’s prior prison term was stayed. He was ordered to pay a \$220 restitution fine, a \$40 court security fee and a \$30 criminal conviction assessment. He was given credit for 109 days served in county jail and another 54 days for good behavior. He timely appealed.

### **Discussion**

Pagan was properly represented by counsel at all stages of the proceedings, and our review of the record discloses no error. Counsel has represented that he advised Pagan of his intention to file a *Wende* brief in this case and that Pagan has the right to submit a supplemental written argument on his own behalf. Pagan has done so, and we have reviewed his assertions of error.

Much of Pagan’s brief seems to challenge the verdict on the basis that Officer Smith was not a credible witness and the jury was wrong to believe him. Indeed, his counsel presented just such an argument at trial. But it is not our function to reweigh the evidence. A judgment supported by substantial evidence will be affirmed, even though

substantial evidence to the contrary exists and the trier of fact might have reached a different result had it believed the contrary evidence. (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 631.)

Pagan also claims that the jury committed assorted acts of misconduct by purportedly reaching a compromise verdict, because certain jurors improperly pressured others to reach a guilty verdict, and the deliberations were too quick. He also makes a claim that the jury was “hung” after the first afternoon of deliberations before the alternate had to be seated. None of these claims is substantiated in the record.

Pagan’s remaining assertions of error are based upon his disagreement with the strategic choices of his counsel. He argues the motion to strike his prior conviction should have been brought earlier than his sentencing, and that he should have been permitted to testify in his own defense. To the extent Pagan is arguing his counsel was ineffective for these reasons, we can think of strategic reasons for counsel to have made the choices he did. An appellate court is not to second-guess counsel’s reasonable tactical decisions. (*People v. Scott* (1997) 15 Cal.4th 1188, 1211–1212.)

Pagan has also been advised of his right to request that counsel be relieved. This court has reviewed the entire record on appeal. No issue requires further briefing.

### **Disposition**

The judgment is affirmed.

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Siggins, J.

We concur:

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McGuiness, P.J.

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Jenkins, J.